United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

77-7125

TO BE ARGUED BY
CHARLES TRYNIN

UNITED STATES COURT OF APPEALS
For The Second Circuit
No. 77-7125/7126

DOROTHY L. COLE, LOIS H. ZISOOK, HARRY W. VOEGE and ANNA MAY TUNMORE, as Trustees, SAMUEL GREENFIELD FUND, INC., and HAROLD STILLER and MILDRED STILLER, as joint tenants,

Plaintiffs,

HARRY W. VOEGE and ANNA MAY TUNMORE, as Trustees,

Plaintiffs-Appellants,

v.

SCHENLEY INDUSTRIES, INC., GLEN ALDEN CORPORATION, RAPID-AMERICAN CORPORATION, ISIDORE A. BECKER, BERNARD GOLDBERG, PAUL A. JOHNSTON, DAVID A. CHERNOW, WALTER O. HEINZE, HOWARD FELDMAN, MILO B. HOPKINS, RUSSELL G. SMITH, ALBERT N. GREENFIELD, MESHULAM RIKLIS, GLEN ALDEN SUBSIDIARY, INC., P. J. CLIFFORD, W. P. JOHNSON, S. KITTAY, M. L. MENDELL, L. C. LANE, G. H. PERKINS, and B. DENMARK,

Defendants-Appellees.

B

P/S

UNITED STATES COURT OF APPEALS
FILED
JUN 8 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

(On Appeal from the United States District Court for the Southern District of New York)

REPLY BRIEF OF PLAINTIFFS-APPELLANTS HARRY W. VOEGE and ANNA MAY TUNMORE, as Trustees

---

CHARLES TRYNIN, ESQ.
Attorney for Plaintiffs-Appellants
Harry W. Voege and Anna May Tunmore,
as Trustees
230 Park Avenue
New York, New York 10017
Tel: (212)986-3855

TO BE ARGUED BY
CHARLES TRYNIN

UNITED STATES COURT OF APPEALS
For The Second Circuit
No. 77-7125/7126

DOROTHY L. COLE, LOIS H. ZISOOK, HARRY W. VOEGE and ANNA MAY TUNMORE, as Trustees, SAMUEL GREENFIELD FUND, INC., and HAROLD STILLER and MILDRED STILLER, as joint tenants,

Plaintiffs,

HARRY W. VOEGE and ANNA MAY TUNMORE, as Trustees,

Plaintiffs-Appellants,

v.

SCHENLEY INDUSTRIES, INC., GLEN ALDEN CORPORATION, RAPID-AMERICAN CORPORATION, ISIDORE A. BECKER, BERNARD GOLDBERG, PAUL A. JOHNSTON, DAVID A. CHERNOW, WALTER C. HEINZE, HOWARD FELDMAN, MILO B. HOPKINS, RUSSELL G. SMITH, ALBERT N. GREENFIELD, MESHULAM RIKLIS, GLEN ALDEN SUBSIDIARY, INC., P. J. CLIFFORD, W. P. JOHNSON, S. KITTAY, M. L. MENDELL, L. C. LANE, G. H. PERKINS, and B. DENMARK,

Defendants-Appellees.

(On Appeal from the United States District Court for the Southern District of New York)

REPLY BRIEF OF PLAINTIFFS-APPELLANTS HARRY W. VOEGE and ANNA MAY TUNMORE, as Trustees

---

CHARLES TRYNIN, ESQ.
Attorney for Plaintiffs-Appellants
Harry W. Voege and Anna May Tunmore,
as Trustees
230 Park Avenue
New York, New York 10017
Tel: (212)986-3855

TABLE OF CONTENTS

		Page
Table of Cases and Authorities		ii
Argument:		
POINT I:	A Parent-Subsidiary Merger, Effected in 1971 Pursuant to §251 of the Delaware General Corporation Law as Amended in 1967, Where the Holders of More Than 10% of the Irredeemable Common Stock of the Surviving Subsidiary Corporation (Formed in 1933) were Required to Surrender Such Stock in Exchange for Cash and Property While the Parent Corporation Holding Less Than 90% of the Subsidiary Corporation's Common Stock Remains as the Sole Stockholder of the Subsidiary Corporation, is Invalid Under the Laws of Delaware	1
POINT II:	This Court has Jurisdiction to Deal with all of the Voege Plaintiffs' Claims	13
POINT III:	The Claims Based on Collateral and Judicial Estoppel are Valid Against Schenley, as well as Against Glen Alden	16
Conclusion		18

TABLE OF CASES AND AUTHORITIES

Page

CASES

Attorney General v. Looker (Sup. Ct. Mich., 1897) 111 Mich. 498, 69 N.W. 929 8

Breslav v. New York and Queens Electric Light and Power Co. (A.D. 2d, 1936), 249 App. Div. 181, 291 N.Y.S. 932, aff'd 273 N.Y. 593 (1937) . . . 1, 5

Bryan v. Block & Blevins Co., Inc., 490 F.2d 56 (5th Cir., 1974) aff'g 343 F.Supp. 1062 (N.D. Ga., 1972), c.d. 42 L.Ed. 2d 72 (1974) 2, 9, 10

Coombes v. Getz, (1931) 285 U.S. 434, 441-2 . . . . . 5, 9

Gibbons v. Schenley Industries, Inc., 339 A.2d 460 (Del. Ch. 1975) 16, 17, 18

Greene v. Schenley Industries, Inc., 281 A.2d 30 (Del. Ch. 1971) 8, 9, 10, 11, 12

Hottenstein v. York Ice Machinery Corporation, 136 F.2d 944, 950 (CA-3, 1943) 11

In Re. Vinarsky, 287 F.Supp. 446, 447 (N.D.N.Y. 1968) 9

Lord v. Equitable Assurance Society (1909) 194 N.Y. 212, 87 N.E. 443 7

Pennsylvania Mutual Fund, Inc. v. Todhunter International, Inc., Del. Ch., not officially reported; Del. Ch. C.A. 4845, August 5, 1975, V.C. Marvel (appended to Voege Opening Brief) . 2, 10, 11

Page

Roginsky v. Richardson Morrell, Inc., 378 F.2d 832, 851 (2d Cir., 1967) 8, 9

Singer v. Magnavox Co., 367 A.2d 1349 (Del. Ch. 1976) 8, 11, 12

Starring v. American Hair & Felt Co., 21 Del. Ch. 380, 191 A.2d 887 (Del. Ch. 1937), aff'd 21 Del. Ch. 431, 2 A.2d 249 (Del. Sup. Ct. 1937) 1

State ex rel. Swanson v. Perkam (Sup. Ct. Wash., 1948) 191 P.2d 689 . . . . . 3, 5, 6, 7

Stauffer v. Standard Brands, Inc., 178 A.2d 311 (Del. Ch. 1962) 3

Sutro Bros. & Co. v. Indemnity Insurance Co. of No. America, 386 F.2d 798, 802 (2d Cir., 1968) 9

Sutton v. Globe Knitting Mills (Sup. Ct., 1936) 276 Mich. 200, 267 N.W. 815 . . . . . 3, 4, 5

Van Gemert v. Boeing Co. (CA-2, 1975) 520 F.2d 1373 14

Voege v. Swett, U.S.D.C., S.D.N.Y., 1973, not officially reported (appended hereto) 2

Warren v. County of Monroe (Sup. Ct. 1966) 51 Misc. 2d 292, 273 N.Y.S. 2d 107, 111 . . . . . 17, 18

Yoakam v. Providence Biltmore Hotel Co. (D.C.R.I., 1929) 34 F.2d 533, 544, 545 . . . . . 5, 9

Yukon Mill & Grain Co. v. Vose (Sup. Ct. Okl., 1949) 206 P.2d 206 1

Page

STATUTES

Delaware General Corporation Law

§151(b) 12

§160(3) 1, 11

§242(2) 13

§251 . . . . . 1, 3, 12, 13

§253 2

§394 . . . . . 1, 9

Chapter 186, Delaware Laws of 1967

§16 8

§33 8

Securities Exchange Act of 1934

Rule 10b-5 13

Rule 14 13

U. S. Constitution

Article 1, §10 1

14th Amendment 1

AUTHORITIES

Fletcher's Encyclopedia of Corporations (Rev. Ed.) Vol. 7, §§3680/1 5

Folk, The Delaware General Corporation Law (Little, Brown) 9, 10

ARGUMENT

POINT I

A PARENT-SUBSIDIARY MERGER, EFFECTED IN 1971 PURSUANT TO §251 OF THE DELAWARE GENERAL CORPORATION LAW AS AMENDED IN 1967, WHERE THE HOLDERS OF MORE THAN 10% OF THE IRREDEEMABLE COMMON STOCK OF THE SURVIVING SUBSIDIARY CORPORATION (FORMED IN 1933) WERE REQUIRED TO SURRENDER SUCH STOCK IN EXCHANGE FOR CASH AND PROPERTY WHILE THE PARENT CORPORATION HOLDING LESS THAN 90% OF THE SUBSIDIARY CORPORATION'S COMMON STOCK REMAINS AS THE SOLE STOCKHOLDER OF THE SUBSIDIARY CORPORATION, IS INVALID UNDER THE LAWS OF DELAWARE.

In sum, the Voege plaintiffs' contentions are:

(1) That under §394 of the Delaware General Corporation Law ("DGCL"), the Delaware legislature had no power to amend §251 by a 1967 amendment to provide for cash and property as the merger consideration in lieu of securities of the surviving corporation to be paid to some of the holders of the irredeemable common stock of the surviving corporation, formed in 1933, by virtue of the prohibitions of DGCL §160(3) and the prohibitions against impairment of contractual obligations and deprivation of property without due process of law contained in U. S. Constitution, Art. 1, §10 and the 14th Amendment thereto (Starring v. American Hair & Felt Co., 21 Del. Ch. 380, 191 A.2d 887 (Del. Ch. 1937), aff'd 21 Del. Ch. 431, 2 A.2d 249 (Del. Sup. Ct. 1937); Breslav v. New York & Queens Electric Light & Power Co. (A.D. 2d, 1936) 249 App. Div. 181, 291 N.Y.S. 932, aff'd 273 N.Y. 593 (1937); and Yukon Mill & Grain Co. v. Vose (Sup. Ct. Okl. 1949) 206 P.2d 206);

(2) That, if there was such power, the cash-in-lieu-of-stock provisions of amended §251 may not be construed, by judicial

legislation, as permitting the "freeze-out" for cash and property of the holders of more than 10% of the irredeemable common stock of the surviving subsidiary corporation, formed in 1933, by merger into it of a paper corporation 100%-owned by the parent corporation holding less than 90% of the common stock of the subsidiary corporation, where the paper company was formed by the parent as a vehicle to achieve such result, where there was no valid business purpose of the subsidiary for such merger, and where the parent corporation was to remain as the sole stockholder of the subsidiary corporation, by virtue of the public policy expressed in §253, which expressly permits parent-subsidiary freeze-out mergers only in situations where the parent corporation holds not less than 90% of the subsidiary's stock, and restricts the class of stockholders to be squeezed out to a legislatively limited "splinter group" (not more than 10% of the subsidiary corporation's stockholders)(see Voege-Swett, opinion appended hereto), and by virtue of the precedent established by Bryan v. Brock & Blevins Co., Inc., 490 F.2d 56 (5th Cir., 1974), where identical provisions of the Georgia merger statutes were construed as not permitting such a freeze-out. (See also: Pennsylvania Mutual Fund, Inc. v. Todhunter International, Inc. (Del. Ch. C.A. 4845, August 5, 1975, Vice Chancellor Marvel, appended to plaintiff Voege's opening brief).)

Assuming that these contentions may be rejected, it is clear, nevertheless, that by the Saving Clause included in the 1967 amendment of §251 (1967, Del. L. Ch. 186, §33):

A. The Delaware legislature did not intend to exercise such power with respect to Schenley, a 1933 corporation;

B. Old §251, as construed in Stauffer v. Standard Brands, Inc. (Del. Ch. 1962) 178 A.2d 311 ("a majority stockholder may not under a §251...merger eliminate minority stockholders as participants in the continuing enterprise"), continued as the law of Delaware that was applicable to the 1971 Glen Alden Subsidiary, Inc.-Schenley merger; and

C. The Glen Alden Subsidiary, Inc.-Schenley merger, proposed in 1971, was invalid and not permitted by the law of Delaware applicable thereto (Old §251).

It is respectfully submitted that the Delaware Supreme Court, in construing the Saving Clause in amended §251, would give to it the same effect as was given to a similar clause by the Michigan Supreme Court in Sutton v. Globe Knitting Mills, 276 Mich. 200, 267 N.W. 815 (1936), and by the Washington Supreme Court in State ex rel. Swanson v. Perkam (1948) 191 P.2d 689.

The Saving Clause incorporated into amended §251 provides that:

> "All rights...vested or accrued by and under any laws enacted prior to the adoption or amendment of this Act...shall not be impaired, diminished or affected by this Act."

In Sutton-Globe Knitting Mills, the Saving Clause reads:

> "This Act shall not impair or affect...any right accruing, accrued or acquired, or liability...incurred prior to the time this Act takes effect, but the

same may be...enforced...as fully and to the same extent as if this Act had not been passed."

In that case, the legislature had passed Act. No. 327, Pub. Acts 1931, which, in §43, authorized, by its terms, amendment of corporate charters to permit postponing of the redemption date of preferred stock. Section 192 of the Act is the Saving Clause quoted above. The Michigan Supreme Court, in ruling that the legislature did not intend, by this Act, to empower corporations to alter the rights of those holding corporate stock issued prior to such amendment, stated:

> "...we should read the statute as a whole and make reasonable application of each of its separate sections.
>
> ...
>
> When read entirely by itself, section 43 of Act No. 327 seems to contain provisions which are extremely broad... But reading the whole Act together and giving effect to each section make it clear that the Legislature had no intention of attempting to give to then existing corporations the power through action of a majority of the stockholders to take from the minority stockholders vested or accruing property rights. ...
>
> ...apparently so that there might be no doubt of the purpose of the Legislature to preserve vested and accruing rights, practically at the close of the Act (which covers more than 50 pages of the Public Acts), in section 192 it is again provided: 'This act shall not impair or affect any...right accruing, accrued, or acquired, or liability...incurred prior to the time this act takes effect, but the same may be...enforced... as fully and to the same extent as if this act had not been passed.' The inescapable conclusion is that notwithstanding the broad terms in which section 43 of the Act is expressed, the Legislature clearly and conclusively intended to preserve vested rights of the character here asserted by the plaintiff. This necessarily appears from reading and giving reasonable effect to each and all of the provisions of the enactment."

The Michigan Court rejected the defendants' "ingenious contention" that if the redemption contract was subject to amendment under the reserved power, then the only right the stockholder had was a conditional right that could be defeated by the happening of the condition, and neither the impairment of contracts clause nor the due process clause of the Federal Constitution was involved. In rejecting this contention, the Court cited Coombes v. Getz, 285 U.S. 434; Yoakam v. Providence Biltmore Hotel Co. (D.C.R.I.) 34 F.2d 533; and Fletcher's Encyclopedia of Corporations (Rev. Ed.) Vol. 7, §§3680, 3681.

(In Breslav, 291 N.Y.S. at 940, the Court, referring to Sutton, held that if, under the reserved power, a stockholder could not be deprived of his right to payment on a named redemption date because of the contract and due process clauses, then a fortiori "his right to remain a stockholder is entitled to equal protection and for the same reason".)

Similarly, in State v. Perkam, the Saving Clause read:

> "This act shall not impair or affect any... right accruing, accrued or acquired...prior to the time this act takes effect, but the same may be enjoyed, enforced, prosecuted or inflicted as fully and to the same extent, as if this act had not been passed."

In that case, the corporation involved was organized under statutes existing in 1919, and its by-laws, in accordance with such statutes, provided for "straight voting", i.e. one vote for each share held, the Trustees to be elected by the greatest number of

votes. Thereafter, the right to vote shares cumulatively was specifically conferred by the Uniform Business Corporation Act, adopted in 1933, and the former provision for straight voting was specifically repealed by a 1939 amendment to the 1933 Act.

The Act providing for cumulative voting provided in §61 that it shall be applicable to existing corporations except where otherwise expressly stated. By §62 and §62(a), straight voting was repealed. §63 contained the Saving Clause quoted above.

The Court posed the question whether the 1919 provisions for straight voting, then repealed, constituted a basis for a "right accruing, accrued or acquired" by the stockholders while the 1919 Act was in effect, with the result that "rights" established by the 1919 statute "may be enjoyed, asserted" and "enforced ...as fully and to the same extent as if" the Uniform Business Corporation Act of 1933 "had not been passed".

The Court ruled:

> "When the legislature of this state passed the Uniform Business Corporation Act in 1933, it of course was well aware of the constitutional reservation of power to alter, amend or repeal all laws relating to corporations. It must be taken as a fact that...the legislature deliberately intended to amend the former law with respect to voting rights, by substituting the cumulative method for the straight voting method, in so far as elections of directors are concerned. However, it must also be conclusively presumed that the legislature deliberately intended to incorporate §63, the saving clause, in the act and that it had some purpose in mind in adopting that section. The legislature well knew that, during the forty-four years subsequent to the adoption of the constitution, many corpor-

ations had come into existence in this state and that millions of dollars had been invested in such enterprises. It knew further, or must be presumed to have known, that much, if not most, of that capital investment had been made in reliance upon the law as it formerly existed, and that by virtue of such investment stockholders had acquired certain rights with respect to voting at stockholders' meetings. The logical conclusion to be drawn from §63 is that the legislature thereby intended that no right, accruing, accrued or acquired prior to the effective date of the act, should be impaired or affected by that act, but, on the contrary, that every such right could be enjoyed, asserted, or enforced as fully and to the same extent as if the act had not passed.

With this interpretation of the act here in question, we are brought to the question whether the right to vote according to the straight voting method was a vested right acquired by the stockholders of this corporation saved and protected by §63 of the Uniform Business Corporation Act, and therefore not impaired or affected by §28(3) conferring the right of cumulative voting.

In our opinion, the right of a stockholder to vote for directors is a valuable vested property right arising out of the contract of incorporation, and it is therefore a right saved and protected by §63 of the Uniform Business Corporation Act. It is not impaired or affected by §28(3), for to deprive the stockholder of such right is to deprive him of an essential attribute of his property."

The Court referred to Lord v. Equitable Assurance Society, 194 N.Y. 212, 87 N.E. 443, as expressing the principle and reasons underlying its opinion. In Lord, the right to vote was declared to be an essential attribute of the stockholder's property rights in his stock, and that to undermine the right to vote would "undermine the right to property involved in the ownership of the stock". If the right to vote is a valuable vested property right because it is an essential attribute of the stockholder's property rights in his stock, then a fortiori the stockholder's property rights

in his stock are a valuable vested property right which is not to be impaired, diminished or affected by the provisions of §16 of Chapter 186 of Del. Laws of 1967, by virtue of the Saving Clause contained in §33 of said Chapter 186.

The Court distinguished Attorney General v. Looker, 111 Mich. 498, 69 N.W. 929 (1897), where the Court upheld a statutory amendment permitting cumulative voting for insurance company directors, as follows:

> "It is manifest that the Looker case, supra, as decided by the supreme court of Michigan, is distinguishable from the case at bar in two vital respects: (1) primarily, in that no saving clause, such as we have here, was a part of the statute there involved; and (2) that the corporation in the Looker case was one in whose affairs the public was interested and whose management affected not only its stockholders but the public as well; while, here, we have simply a private corporation in whose affairs and management the public has no interest or concern whatever. That case therefore has no bearing upon the questions which we are here concerned."
>
> (Emphasis supplied.)

There is no public interest in permitting Glen Alden to squeeze out Schenley's minority stockholders holding more than 10% of each class of its stock.

Defendant-appellee's reliance upon the lower (Chancery) court rulings in Greene v. Schenley (281 A.2d 30, Del. Ch. 1971) and Singer v. Magnavox (367 A.2d 1349, Del. Ch. 1976) is misplaced.

This Court is not concluded as to the law of Delaware by any ruling other than that of the Delaware Supreme Court. (Rogin-

sky v. Richardson Morrell, Inc., 378 F.2d 832, 851 (2d Cir., 1967); In Re. Vinarsky, 287 F.Supp. 446, 447 (N.D.N.Y. 1968); Sutro Bros. & Co. v. Indemnity Insurance Co. of No. America, 386 F.2d 798, 802 (2d Cir., 1968).) Nor is this Court bound by any ruling of even the Delaware Supreme Court insofar as it deals with the extent that Delaware, by means of the reserved power to amend or repeal corporate charters (§394, DGCL), may affect or alter shareholders' constitutionally protected property and contract rights and interests in the corporation. (Coombes v. Getz, 285 U.S. 434, 441-442 (1931) and Yoakam v. Providence Biltmore Hotel Co. (D.C.R.I., 1929) 34 F.2d 533, 544, 545.) Of more precedental value in this Court is the ruling of the Fifth Circuit Court of Appeals in Bryan v. Brock & Blevins Co., Inc., 490 F.2d 56 (1974) c.d. 42 L.Ed. 2d 72 (1974)(dealing with provisions of the Georgia merger statute which are substantially identical with Delaware's §251) in stating the local law to be applied by a federal court.

Greene-Schenley cannot be regarded as a definitive and authoritative statement of Delaware law.

By that opinion, an application for a temporary injunction was denied. It is well established that an application for a temporary injunction does not call upon the Court to decide the merits of the case, and the grant or denial of a temporary injunction does not settle the law of the case or have res adjudicata effect, nor does it preclude the parties in later trying the merits of the case.

In commenting on Greene-Schenley, Professor Folk, in his

treatise on The Delaware General Corporation Law (Little, Brown), stated, at page 335, that:

> "It considered that the minority stockholders of the merged corporation have no greater rights under §251 than under the short merger statute (§253), an apparently novel proposition for which no authority is cited."
> (Emphasis supplied.)

This "novel proposition" was subsequently rejected and Greene-Schenley was disavowed by Chancellor Marvel in Todhunter when he stated, with specific reference to Schenley, that:

> "I have doubt also as to whether or not the merger such as this may be accomplished under §251 with the facility available under §253. In the Schenley case the Court was involved with two operating companies and not with two shell companies."

(Here, Chancellor Marvel was in error. Schenley involved the merger of Glen Alden Subsidiary, Inc. (a shell corporation) into Schenley Industries, Inc., an operating and the surviving corporation. Greene-Schenley was not distinguished, but, in fact, was overruled by Todhunter.)

Greene-Schenley in the Delaware Chancery Court was discontinued by consent of the parties before reaching the merits.

In Todhunter, Vice Chancellor Marvel stated the local law of Delaware as in accord with the rule enunciated in Bryan-Brock & Blevins Co. when he stated:

"...I have some doubt as to whether or not the merger under attack has a valid business purpose. ... Here there is to be no change in the business but merely an elimination of unwanted minority stockholders.

I feel therefore that there is some possibility ...of a showing of illegality of this plan by reason of it being a possible manipulation of corporate control for private purposes with no proper business purpose in mind. I have doubt also as to whether or not a merger such as this may be accomplished under §251 with the facility available under §253.

...Use of control to freeze out or manipulate a corporation to the detriment of the minority stockholders has always been frowned on by this Court. Bennett v. Breuil Petroleum Corporation, 34 Delaware Ch. 6, Condec v. Lunkenheimer, 43 Delaware Ch. 353, and Schnell v. Chris-Craft, Sup. Ct. 285 A.2d 437."

In Singer-Magnavox, Vice Chancellor Brown resurrected and followed Greene-Schenley, despite the disavowal by Vice Chancellor Marvel in Todhunter, and rejected Todhunter on obviously specious and unsubstantial grounds. He cited no case of the Delaware Supreme Court in favor of his position on the freeze-out aspect of the case. He also relied upon the unique Delaware doctrine of independent legal significance, i.e. "that a result prohibited by action attempted under one section of the law may be entirely permissible when accomplished through the authorization of another". This doctrine cannot be expanded to permit a result to be achieved under the merger provisions which is prohibited by the provisions of the Federal Constitution (Hottenstein v. York Ice Machinery Corporation (CA-3, 1943) 136 F.2d 944, 950). The provision of DGCL §160 that "no corporation shall...redeem any of its shares unless their redemption is authorized by Section 151(b)..." forbids a Delaware

corporation from achieving this result (redemption of shares) under any provision of the DGCL, except §151(b), and, therefore, no other provision can have independent legal significance to authorize the redemption of irredeemable common stock.

Furthermore, in neither Greene nor Singer did counsel bring to the attention of the Court, nor did the Court consider or construe the Saving Clause of amended §251.

Finally, what minimum precedental value may be ascribed to Singer is undercut by the fact that Vice Chancellor Brown's ruling has been appealed to the Delaware Supreme Court, where the appeal was argued on March 14, 1977. It may well be that if that Court reaches the issues here presented, its rulings may definitively determine the Delaware law here involved, subject to this Court's final disposition of the Federal questions concerning the shareholders' constitutionally protected contract and property rights and interests.

POINT II

THIS COURT HAS JURISDICTION TO DEAL WITH ALL OF THE VOEGE PLAINTIFFS' CLAIMS.

There is ample jurisdictional predicate for all of the Voege plaintiffs' claims, including the "third party beneficiary claim".

The amended and supplemental complaint alleges that jurisdiction of Count III is based on the Federal Securities Acts.

Claims of violation of Rules 10b-5 and 14 are based on:

(a) false proxy statement representations that Schenley's minority common stockholders were required, by law, to surrender their stock for cash and property worth $29 per share, by virtue of the consummation of a merger that was legally authorized[1] under DGCL amended §251; and

(b) failure to adequately disclose:

(i) that Schenley's minority common stockholders were entitled to receive shares in the surviving corporation;

(ii) that as third party beneficiaries of the Rosenstiel-Glen Alden 1968 Stock Purchase Contract, Schenley's common

---

(1) Arguably, the representation that Glen Alden had the majority shares required for merger approval was likewise false since §251(c) must be construed, in the light of §242(2), to require, as well, approval by a majority of the adversely affected shares, voting as a separate class, where the merger adversely affects only some, but not all, of the shares of the same class.

stockholders were entitled to receive a merger consideration worth at least $53-1/3 per share;

(iii) that by virtue of the doctrines of judicial and collateral estoppel, Glen Alden (and Schenley) was estopped to offer to them less than $53-1/3 per share, if the 1971 "factual situation was substantially identical to that which existed in 1968"; and

(iv) that the 1971 factual situation was substantially identical to that which existed in 1968.

These federal claims are substantial and not merely colorable.

In Van Gemert v. Boeing Co. (CA-2, 1975) 520 F.2d 1373, the lower court had dismissed the federal and common law claims. This Court affirmed the dismissal of the federal claims and, exercising pendent jurisdiction, reversed the dismissal of the common law claims, stating:

> "The claim that Boeing is civilly liable under federal law for violation of the N.Y.S.E. Listing Agreement and Section A10 of the Company Manual is a colorable one... The claim for relief is sufficient for jurisdictional purposes in any event."
> (Emphasis supplied.)

The claims over which jurisdiction was retained, despite the affirmance of the dismissal of the "colorable" federal claim, included a claim that the appellants were third party beneficiaries under state law of certain agreements between Boeing and

the NYSE, a claim that the indenture securing the redeemable convertible bonds held by the plaintiff class was in the nature of a contract, which was breached by Boeing, and a claim that the call for redemption was illegal and void because it was based on an improper conversion ratio.

It is respectfully submitted that Van Gemert is applicable here. Neither Judge Lasker nor Judge Owen had any jurisdictional doubts in passing on the third party beneficiary claim and the other claims asserted by the plaintiff Voege, and defendant-appellee's challenge to jurisdiction, made here for the first time on this appeal, is a belated afterthought without any basis or foundation in fact or in law.

POINT III

THE CLAIMS BASED ON COLLATERAL AND JUDICIAL ESTOPPEL ARE VALID AGAINST SCHENLEY, AS WELL AS AGAINST GLEN ALDEN.

In Gibbons v. Schenley Industries, Inc. (Del. Ch. 1975) 339 A.2d 460, at 466, it appears that a dissenting stockholder party to the Schenley appraisal proceeding had argued that the Court-approved settlement of the charges as to the fairness of the price of $53-1/3 offered by Glen Alden to the Rosenstiel group for their Schenley shares, reached in Sanders v. Riklis, barred Schenley from questioning such price on the basis of principles of res judicata and estoppel.

Vice Chancellor Marvel rejected that contention, on the ground that Schenley was not a party to Sanders-Riklis, stating:

> "In short, I am satisfied that inasmuch as Schenley was not a subsidiary of Glen Alden at the time of the acquisition complained of, or otherwise a participant in such litigation, it is not barred by the doctrines of res adjudicata or estoppel from taking the position that the price paid for Schenley shares by Glen Alden in 1968 does not bar Schenley from seeking to establish that the price of approximately $53 per share was not the floor for the value of Schenley common stock as of the time of the merger here under attack."

This ruling is erroneous.

At the time of the injunction motion in Sanders-Riklis (where the Greenberg affidavit of May 2, 1968 was interposed by Glen Alden), Glen Alden held 18% of Schenley's stock and was committed to make an offer to acquire all the remaining stock. At the

time the settlement of Sanders-Riklis was proposed to the referee, March 19, 1971 (A863.28, A863.29), and at the times the merger terms were approved by Schenley's board of directors (March 25, 1971) and voted on by Schenley's stockholders (June 1971), Glen Alden held 86% of Schenley's common stock. At the time of the approval of the settlement in Sanders-Riklis and the judgment of dismissal therein, at the time of the appraisal proceeding hearing and at the time of the trial below, Glen Alden was the sole stockholder of Glen Alden.

It is clear on this record that Glen Alden, which, as the sole stockholder of Schenley, was the real party in interest, although not formally a party of record, in Gibbons-Schenley, could not use the corporate cloak of Schenley to avoid the collateral estoppel and res adjudicata effect of the Sanders-Riklis injunction motion ruling, and of the judgment dismissing the complaint with prejudice in that case.

As stated in Warren v. County of Monroe (Sup. Ct. 1966) 51 Misc. 2d 292, 273 N.Y.S. 2d 107, at 111:

> "...plaintiff Warren is the sole or major stockholder of plaintiff Rochester Truck Rental, Inc., and therefore he:
>
> 'will not be permitted to use the corporate cloak as a means to avoid the finality of the former adjudication to which he was a party. ... The (plaintiff)...corporation must be deemed to have been in privity with (Warren)... and, therefore, the decision of the Court ...is binding on it also.'
>
> (McNamara v. Powell, 256 App. Div. 554, 11 N.Y.S. 2d 491). See also, Matter of Shea's Will, 309 N.Y. 605, 132 N.E. 2d 864.)"

Gibbons was therefore wrongly decided, in failing to give effect as to Schenley (Glen Alden's 100% subsidiary) to the res adjudicata and collateral estoppel emanating from the adjudications in Sanders-Riklis, which compelled an appraisal valuation for Schenley common as of the merger date of $53-1/3 per share.

Absent the jurisdiction question as to Schenley, Vice Chancellor Marvel did not dispute that such doctrines were binding as to Glen Alden, a defendant of record in this action.

Upon the basis of Warren v. County of Monroe, these doctrines are binding here on Schenley as well.

CONCLUSION

Plaintiffs-Appellants Voege respectfully submit that the judgment appealed from should be reversed and the relief specified at page 70 of said plaintiffs-appellants' opening brief herein be granted in full.

Dated: New York, New York
June 7th, 1977.

Respectfully submitted.

CHARLES TRYNIN
230 Park Avenue
New York, New York 10017
Tel: (212)986-3855
Attorney for the Voege
Plaintiffs-Appellants

ORIGINAL

FILED
S.D. OF N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

HARRY W. VOEGE and HOWARD B. HILLMAN,

Plaintiffs,

-against-

BRADFORD N. SWETT, JAMES M. GRAVES, TRUXTON B. PRATT, JR., McCULLOUGH CORPORATION, NEW MR CORPORATION, and MAD RIVER CORPORATION,

Defendants.

----------X

72 Civ. 3574

MEMORANDUM AND ORDER

MAILED
NOV 2 1973

Brieant, J.

Plaintiffs, minority shareholders in defendant Mad River Corporation ("Old MR"), move for summary judgment pursuant to Rule 56, F.R.Civ.P., for liability upon the second cause of action only in the amended complaint. Defendants also move for summary judgment, again solely with respect to the second cause of action.

Discovery is not complete, although extensive depositions have been read in support of the motions.

Jurisdiction of the second cause of action is pleaded based on §27 of the Securities Exchange Act of 1934, 15 U.S.C.

§78aa and diversity. Pendent jurisdiction could also be exercised of the second cause of action. Defendants do not attack the first cause of action.

There is no diversity. Plaintiff Voege is a citizen of New York and defendants McCullough Corporation ("McCullough") and New MR Corporation ("New MR") are Delaware and Vermont corporations, respectively, each of which has its principal office in this district.1/ (See original complaint, Pars. 2d, 4 and 5). Plaintiff Voege owns, or owned, 1,200 shares of Old MR voting stock, which plaintiffs estimate to have a value of $58.00 per share, and plaintiff Hillman owns, or owned, 400 shares thereof.

Defendants effected, or purported to effect, a statutory merger under Vermont law, betweeen Old MR and New MR, a naked corporate vehicle formed by the individual defendants for that purpose. As a result of that merger, defendant McCullough, of which the individual defendants Swett, Graves and Pratt are officers-directors-shareholders, and which had been, immediately prior to the merger, the sole shareholder of New MR, became the sole shareholder of the resulting merged corporation. The non-consenting shareholders of Old MR, including plaintiffs

(who had not sold their shares to McCullough under a prior tender offer) were to be excluded from the business by payment to them, pursuant to the statutory plan of merger, of the sum of $16.50 per share by check of the resulting corporation, delivered against surrender of their Old MR stock.

The first cause of action pleaded assumes that an effective merger has been completed, and seeks money damages only, by reason of an alleged breach by defendants of their obligations to plaintiffs under Section 10 of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder.

New MR and Old MR, are each Vermont corporations. The effectiveness or validity of the merger must be determined according to the law of Vermont.

By their second cause of action, plaintiffs seek declaratory and injunctive relief upon the different assumption that the plan and agreement of merger is invalid under the Vermont Business Corporation Act, and ineffective to accomplish the merger of New MR into Old MR, and thereby extinguish plaintiffs' shares and require surrender thereof in exchange

for the payment of $16.50 per share by check of the corporation.

It is not disputed that plaintiffs objected to the proposed statutory merger, attended the shareholders meeting, filed written objections, and caused their proxies to be voted against the merger.

At the time of the shareholders meeting, McCullough owned 55,553 shares out of 62,326 Old MR shares outstanding, which is slightly more than eighty-nine percent (89%). Holders of 401 additional shares voted for the plan, and 1,630 shares, of which these plaintiffs owned 1,600, were voted against the plan.

On August 22, 1972, the Vermont Secretary of State, acting pursuant to Vermont Business Corporation Act, §1954,[2/] approved the merger of New MR into Old MR, and filed the articles of merger in his office. The articles of merger comprised the plan of merger previously mentioned, and provided for the extinguishment of the outstanding shares of Old MR, with each of the shareholders thereof (except McCullough), to receive a cash payment of $16,50 for each full share so held.

The individual defendants Swett and Pratt signed as President and Secretary and Assistant Secretary respectively, in behalf of all three corporations, both Old MR, New MR and McCullough.

Before the defendants Swett, Graves and Pratt conceived the plan complained of, Old MR had approximately 160 shareholders, owning 62,326 voting shares, all of one class. It was the proprietor of Mad River Glen, an established mountain and ski resort, which comprised approximately 1,600 acres of land.

On December 7, 1971 defendant Swett approached a New York bank, to negotiate financing for McCullough to tender for Old MR stock. At that time, Pratt had served for more than ten years as a director of Old MR, and owed a fiduciary duty and the obligation of fair dealing to all the shareholders, including plaintiffs.

Swett told the bank that Old MR owned real estate, carried on its books at historical cost, in accordance with generally accepted accounting principles, at $17,700.00, but worth approximately $8,000.00 per acre, or $3,200,000.00. He

expressed an intention, after acquiring control, to improve the operation of the resort business, and to sell the land for development on a piecemeal basis.[3/] One Palmedo, who owned 11,858 shares, or more than 19% of Old MR voting stock, and had exercised effective control for almost a quarter century was in his mid-seventies, and had operated Old MR "more as a club than as a business enterprise". Palmedo was considering retirement, was worried about the lack of liquidity in his estate, and willing to sell his stock to McCullough at $16.50 per share.

Swett, acting for McCullough, gave the bank detailed financial information and projections based on knowledge and data which could come to McCullough only from Pratt's or Palmedo's knowledge acquired as a director of Old MR for more than ten years. As a result, the bank gave a loan commitment on December 31, 1971 for a five year term loan of $500,000.00 to assist McCullough in a tender for Old MR stock. A condition of the loan was "consents from 66 2/3% of Mad River shareholders to merge".

By their second cause of action, plaintiffs assert

that a fair reading of the Vermont statutory scheme for corporate mergers newly effective on July 1, 1971, impels the conclusion, as a matter of law, that [Amendment to Complaint, ¶19(c) and (d)]:

> "... a Vermont corporation which does not own at least 95% of the shares of each class of another Vermont corporation has no power to effect a legal merger of the other corporation where the plan of merger does not set forth the manner and basis of converting the shares of each merging corporation into shares or other securities or obligations of the surviving corporation, but instead, seeks to require the surrender of each share of the other corporation for cash.
>
> (d) By virtue of the foregoing, the Plan and Agreement of Merger herein complained of which does not provide for the converting of plaintiffs' shares into shares or other securities or obligations of the surviving corporation, but which provides that only McCullough Corporation will receive shares of the new corporation, does not conform to and is not authorized by the law of Vermont, and is illegal, invalid and ineffective to extinguish the shares of Mad River held by plaintiffs or to cause the certificates held by the plaintiffs which represent such shares to represent merely the right to receive the sum of $16.50 in cash for each of such shares, from Mad River Corporation." (Underlining in original pleading.)

Plaintiffs also allege (Amendment, ¶21) that the payment of $16.50 per share is and was grossly inadequate, and that

defendants are attempting to use the illegal, invalid and ineffective Plan and Agreement of merger "as a device to effect an illegal condemnation and appropriation of the property of the minority stockholders, including the plaintiffs for a grossly inadequate price, by enticing, luring and inducing them to endorse and surrender their certificates for Mad River stock in return for such per share cash payment upon the false representation that said shares have been extinguished by a legally effective merger and that the certificates therefor represent only the right to receive such cash payment."

Plaintiffs' motion for summary judgment is denied, as a matter of discretion. Discovery is not complete. Serious factual issues remain for resolution by a trial. Not the least of these is whether fraud and deceit by McCullough in the tender offer, which these plaintiffs did not accept, is the proximate cause of damage to plaintiffs, or actionable at their behest. Cf. Chris-Craft Industries, Inc. v. Piper Aircraft, ___ F.2d__(2d Cir. March 16, 1973). There is a fair indication of such fraud. McCullough, after telling the bank in December, 1971, through Swett, in detail and in writing, of its plans

and projections to change Old MR's way of doing business [characterized as being "more like a club"], in order to justify the necessary line of credit, later told the Old MR shareholders in its written tender offer, dated January 14, 1972 and duly mailed, that "McCullough has no present intention of making any major change in the business of [Old] Mad River." (page 2)

We do not characterize this statement in the tender offer as a barefaced lie to the shareholders. On a plenary trial it may turn out to be so. Old MR had net income (after depreciation of $69,000.00) amounting to only $76,000.00, hardly enough for cost of capital and debt after almost a million dollars had been used for the tender offer. Without the numerous major operational changes suggested in Swett's interview with the bank, could the loan have been justified?

We turn now to defendants' motion, which turns on the legal theory that "the sole issue ... is whether the Plan and Agreement of Merger ... conforms with the requirements of the Vermont Business Corporation Act." If it does, then plaintiffs have been effectively frozen out of Old MR, they

have a full right of appraisal, under Vermont law, and that is the end of it.

In support of this theory, defendants urge that the check of the surviving corporation for $16,50 satisfies that portion of §1951(b)(3) of the Vermont Business Corporation Act that requires the Plan of Merger provide for "the manner and basis of converting shares of each merging corporation into shares or other securities or obligations of the surviving corporation." (Emphasis supplied.)

Is a check (or sight draft) for $16.50 in cash a "security or obligation" in this context, as a matter of statutory construction? While we should and do reserve for a full plenary trial, a determination as to whether this construction is correct, there is implicit therein a further question not briefed, that is: if a check might be a "security or obligation" under circumstances of a fair merger transaction, bargained at arms length between two corporations proposing to consolidate, does the statute force a Vermont court of equity to remain silent when an oppressive majority would defraud and freeze-out a minority, by forcing a merger with its own

paper corporation, followed by cash (or check) payment to the minority?[4]/

An examination of the statutory scheme for mergers in Vermont would indicate otherwise. By T.11 §1955, entitled "Merger of subsidiary corporation", Vermont in effect limits the rights, and the consequent opportunity for obstruction, of a small minority. That statute declares the public policy of Vermont where the minority is 5% or less. Then, under T.11 §1955, the 95% corporate owner may force a merger with itself "without approval by a vote of the shareholders of either corporation", and may by director's resolution determine "the manner and basis of converting the shares of the subsidiary corporation into shares or other securities or obligations of the surviving corporation" [tracking the language of §1951(3) of Title 11], "or the cash or other consideration to be paid or delivered upon surrender of each share of the subsidiary corporation". (Emphasis supplied.)

Apparently the Vermont legislature envisioned compulsion of a 5% or smaller, and therefore insignificant, minority to take cash and get out, under §1955, but contemplated

no such result in a traditional merger under §1951, where less than 95% (here, 89%) was owned by the merging company.

The Vermont legislature could, and apparently did, conclude, reasonably, that when a minority interest in a merger is 5% or less, no impedence should be allowed. No question of due process is involved, because dissidents in any case may assert their right of appraisal. (See T.11 §2004 V.S.A., also effective July 1, 1971.)

Defendants present the amusing argument that because §1954 of Title 11 of the Vermont Statutes directs that the Articles of Merger may be accepted by the Secretary of State only if he first finds "that such articles conform to law", and that member of the Executive Branch of government of Vermont [See T.3, V.S.A. §152, et seq.] has so determined, sub silentio, by accepting them for filing, without an adversary hearing, plaintiffs and this Court are concluded here from challenging that "decision".

Defendants, citing Udall v. Tallman, 380 U.S. 1, 16, 17 (1965) tell us that this interpretation (apparently in

a single instance, the first to arise under a comparatively new statute) "must be upheld on judicial review as long as there was a reasonable basis for it." (Brief p.6.)

But we are not engaged in judicial review of any act of the learned Secretary of State of Vermont; he is not a party to this action, nor are we asked to direct him to do anything with respect to his public records or otherwise. We sit as a court of equity; if the substantive rights plaintiffs enjoy as minority shareholders in Old MR have been affected adversely by inequitable or unlawful conduct of the corporate affairs, we may fashion a full remedy by declaratory judgment, injunctive relief or damages awarded against the parties before the court, and do all this without "reviewing" any act of the Secretary of State of Vermont.

Under Erie principles, we need not be concluded by a Vermont judicial precedent in a litigated case elsewhere than in the Supreme (highest appellate) Court. See Roginsky v. Richardson Merrell, Inc., 378 F.2d 832, 851 (2d Cir. 1967) and cases therein cited. Rather, we may, and indeed must "search for that 'educated guess' as to what the law of Vermont would

be, as interpreted by the state's highest court. In Re Vinarsky, 287 F.Supp. 446, 447 (N.D.N.Y. 1968), citing Sutro Bros & Co. v. Indemnity Insurance Co. of No. America, 386 F.2d 798, 802 (2d Cir. 1968). We are not to be concluded on a question of substantive law by the ex parte determination of the Secretary of State to accept a document for filing in his office. 5/

There is reason to believe that Vermont will, in a proper case, grant equitable relief to a minority interest greater than 5% sought to be frozen out by a merger. Title 11 §1951(b)(3) V.S.A. refers to "converting the shares of each merging corporation into shares or other securities or obligations of the surviving corporation. In Delaware, two separate statutory schemes for merger, similar to Vermont's, were construed in Stauffer v. Standard Brands, Inc., 178 A.2d 311, aff'd. 187 A.2d 78 (1962). One provision, §253 of the Delaware General Corporation Law specifically provided for payment of cash to the minority at the instance of a holder of 90% or more [just like 11 V.S.A. §1955(2)]. Other provisions, calling for a two-thirds shareholder vote, provided for conversion into "shares or other securities" of the resulting

corporation. Elimination from participation by the minority was, under a less than 90% situation, termed unauthorized. To the same effect is Outwater v. Public Service Corp. of New Jersey, 103 N.J.Eq. 461, aff'd. 104 N.J.Eq. 490 (1929) construing a statute calling for "other securities or obligations of the surviving corporation." See also Marcou v. Federal Trust Co., 268 A.2d 629 (Sup.Me. 1970).

The second cause of action appears to state a claim under now familiar Rule 10b-5. Such a claim is specifically pleaded. (Amendment to Complaint, Par. 17(a) and (b).) Even if the Vermont statute be construed to require plaintiffs to accept cash or check in a §1951 merger, and to remit him to the exclusive remedy of a state appraisal pursuant to T.11, V.S.A. §2004, this Court is not precluded from granting a federal remedy under the securities laws. Vine v. Beneficial Finance Co., 374 F.2d 627, 635-6 (2d Cir. 1967). Such remedy is not limited to money damages. Voege v. American Sumatra Tobacco Corp., 241 F.Supp. 369, 375-6 (D.Del. 1965); Miller v. Steinbach, 268 F.Supp. 255 (S.D.N.Y. 1967); Eagle v. Horvath, 241 F.Supp. 341 (S.D.N.Y. 1965); Kane v. Central Am. Mining &

Oil Co., Inc. 235 F.Supp. 559 (S.D.N.Y. 1964); J.I. Case Co. v. Borak, 377 U.S. 426 (1964).

Defendants suggest that an adequate remedy at law exists, in that plaintiffs, if their theory is sustained, may recover money damages, or, even without the necessity of proving more than that they dissent, can recover the full appraised value of the shares, under 11 V.S.A. §2004.

It is unlikely, but not certain at this stage of litigation, that in sustaining plaintiffs' federal claims after trial, we would grant equitable relief of any kind. But this question must be held for a later day, and we cannot deprive plaintiffs of their day in court, or their right to pursue a legal theory which, on adequate proof may be held valid.

Defendants' motion for summary judgment is denied.

So Ordered.

Dated: New York, New York
March 30, 1973

Charles L. Brieant

CHARLES L. BRIEANT, JR.
U. S. D. J.

FOOTNOTES

1/ 28 U.S.C. §1332(c)

2/ This statute, newly enacted, effective on July 1, 1971, reads in relevant part as follows:

> "(b) The board of directors of each corporation shall, by resolution adopted by each such board, approve a plan of merger setting forth:
>
> * * *
>
> (3) The manner and basis of converting the shares of each merging corporation into shares or other securities or obligations of the surviving corporation."

Enacted as a part of the entire applicable statutory scheme are §§1955 and 2004. Section 1955 reads in relevant part as follows:

> "(a) Any corporation owning at least 95 per cent of the outstanding shares of each class of another corporation may merge such other corporation into itself without approval by a vote of the shareholders of either corporation. Its board of directors shall, by resolution, approve a plan of merger setting forth:
>
> * * *
>
> (2) The manner and basis of converting the shares of the subsidiary corporation into shares or other securities or obligations of the surviving corporation or the cash or other consideration to be paid or delivered upon surrender of each share of the subsidiary corporation."

Section 2004 provides the customary right of appraisal and payment for dissenters.

3/ There were more specific plans to improve the operation of Old MR which Swett detailed to the bank in December, 1971, including increased prices, providing more intermediate skiing, improved sales promotion, a new land development master plan being prepared by an architect, keeping the restaurant open longer, and lastly, lumbering operations which "should add $5,000.00 to $10,000.00 to earnings per year".

4/ McCullough was organized by a small group which included a director of Old MR. Its sole purpose was to serve as a means to effect this corporate freeze-out of plaintiffs and others holding shares in Old MR. New York permits such conduct, in the absence of fraud or violation of federal securities laws, where a favorable vote of two-thirds of shares exists. Dissenters have the right of appraisal. See, e.g. New York Business Corporation Law §§902(a)(3), 903(a)(2),910; Voeller v. Neilston Warehouse Co., 311 U.S. 531 (1941); Dynamics Corp. of America v. Abraham & Co., 4 Misc.2d 50, 152 N.Y.S.2d 807, modified on other grounds 6 A.D.2d 1005, 153 N.Y.S.2d 533, leave to appeal denied 2 A.D.2d 673, 153 N.Y.S.2d 533 (1956);

Williams v. Bartell, 34 Misc.2d 552, 226 N.Y.S.2d 187, modified on other grounds 16 A.D.2d 21, 225 N.Y.S.2d 351 (1st Dept. 1962); Blumenthal v. Roosevelt Hotel Corp., 115 N.Y.S.2d 52 (1952); Beloff v. Consolidated Edison Co., 300 N.Y. 11 (1949); Anderson v. International Minerals & Chemical Corp., 295 N.Y. 343 (1946); Matter of Fulton, 257 N.Y. 487 (1931); Logan v. New Amsterdam Gas Co., 224 N.Y. 664 (1918); Matter of Timmis, 200 N.Y. 177 (1910).

5/ The local view of the effect of the Secretary's acts is discussed in an exchange of correspondence. On August 30, 1972, plaintiffs' Vermont counsel wrote the Hon. Richard Thomas, Secretary of State of Vermont as follows:

"Re: Mad River Corporation

Dear Dick:

I have been told by ..., a New York City lawyer, that your office has ruled that the 'squeeze out' of minority stockholders is permitted under 11 V.S.A. 1951.

He further stated that your office advised him the Attorney General is too busy running for Governor to render an opinion.

I am appalled that your office would take such a position in opposition of minority stockholder rights and that the Attorney General's office has stopped operating because he is too busy campaigning for Governor.

I would appreciate your comments."

STATE OF NEW YORK : COUNTY OF NEW YORK

LIVI FRENCH, being duly sworn, deposes and says that deponent is over 18 years of age, resides at 415 East 85th Street, New York, New York 10028, and is not a party to this action.

That on the 7th day of June, 1977, deponent made due service of two copies of the annexed Reply Brief of Plaintiffs-Appellants Harry W. Voege and Anna May Tunmore, as Trustees, by mail through the United States (Grand Central) Post Office to the following:

FRIED, FRANK, HARRIS, SHRIVER & JACOBSON, ESQS.
Attorneys for Defendants Glen Alden Corporation, et al.
120 Broadway
New York, New York 10005

SIMPSON, THACHER & BARTLETT, ESQS.
Attorneys for Individual Defendants
1 Battery Park Plaza
New York, New York 10004

RUBIN, BAUM, LEVIN, CONSTANT & FRIEDMAN, ESQS.
Attorneys for Defendants Rapid-American
Corporation and Meshulam Riklis
645 Fifth Avenue
New York, New York 10022

MILTON B. SEASONWEIN, ESQ.
Attorney for Defendant Schenley
Industries, Inc.
888 Seventh Avenue
New York, New York 10019

HERMAN ODELL, ESQ.
460 Park Avenue
New York, New York 10022

KASS, GOODKIND, WECHSLER & GERSTEIN, ESQS.
122 East 42nd Street
New York, New York 10017

LESSER, RUTMAN & KURTZ, ESQS.
475 Fifth Avenue
New York, New York 10017

Attorneys for Plaintiffs

Lisi French

Sworn to before me this
7th day of June, 1977.

Notary Public

CHARLES TRYNIN
Notary Public, State of New York
No. 31-9387700
Qualified in New York County
Commission Expires March 30, 1978